

2000521 (Migration) [2023] AATA 3858 (31 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mr Fayyaz Ali Shah (MARN: 1570276)
CASE NUMBER:	2000521
MEMBER:	Donna Petrovich
DATE:	31 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 Partner (Provisional) visa: • cl 309.211 (2) of Schedule 2 to the Regulations • cl 309.221 (1) of Schedule 2 to the Regulations

Statement made on 31 October 2023 at 2:29pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – development and duration of relationship – sponsor’s financial support of applicant’s brother’s business – social activities limited by work, young child with developmental condition and pregnancy – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65

Migration Regulations 1994 (Cth), Schedule 2, cls 309.211(1), (2), 309.221(1)

CASE

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 12 December 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the 'primary applicant') applied for the visa on 1 May 2018 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211(2) of the Regulations. This is because the delegate was not satisfied by the evidence that the visa applicant, at the time of application, was the spouse of the sponsor as defined by s. 5F of the Act.
4. The delegate also made reference to cl. 309.211(3), finding that it was not met as the couple were legally married.
5. The review applicant appeared before the Tribunal on 18 October 2023 to give evidence and present arguments. The Tribunal also received oral evidence from [the primary applicant] and [the primary applicant's brother].
6. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.

7. Background

8. The primary applicant is a [Age] year old [Country 1] man who was granted a Visitor visa on 27 May 2016. The delegate's decision outlines the primary applicant's immigration history. It details that [in] June 2016, he arrived in Australia on this Visitor visa. On 11 August 2016 he applied for a [Specified] visa, which was refused on 2 January 2018. On 7 February 2018 the primary applicant appealed his [visa] refusal. A search of Departmental movement records by the Tribunal shows that on 11 April 2018 the primary applicant was granted a Bridging Visa C.
9. The delegate's decision says that on 1 May 2018 the primary applicant lodged a Partner Visa while offshore in [Country 2] and was granted a Bridging visa A on 10 October 2019. A search of Departmental movement records by the Tribunal shows that the primary applicant is presently in Australia as the holder of a Bridging visa B which appears to have been granted when his Bridging visa A ceased on 11 April 2018.
10. [Information about specified visa application redacted.]
11. Following the couple's marriage in Melbourne [in] October 2017, they made an application for 309 Partner Visa while visiting the sponsor's family in [Country 2]. A copy of the wedding certificate has been provided to the Tribunal in support of their review.
12. The couple met when working for the same company. The sponsor was working in [a] department as an Associate of the [Job title] (who is the primary applicant's brother), whilst

the primary applicant was employed as a supervisor for the company. Their employer manufactured and sold [goods].

13. They became friendly and started going out. But initially they did not tell the primary applicant's brother.
14. The sponsor was previously married. In 2016 she divorced her prior husband. She has one child from her previous marriage, a daughter who is now a teenager. The daughter lives with her mother (the sponsor/review applicant) as well as with the primary review applicant who supports them financially.
15. The primary applicant has not been previously married and has declared no prior relationship/s.
16. In 2017 they moved into a rented property that was rented by the primary applicant's brother, as they had not been successful in any of their previous rental applications.
17. The couple have one child from their marriage, a [Age] year old boy who is non-verbal and has been diagnosed with [a Developmental condition]. They are having another child. The sponsor is 6 months pregnant with the baby that is due around Christmas.
18. Currently, the primary applicant is in partnership with his brother in a [business] which he manages. As his brother also works as [an Occupation 1] for another company, the primary applicant is responsible for day-to-day operations of the [business]. The [business] now has assets of 1.1 million dollars, employing four [Occupation 2]s.
19. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

20. CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in the present case is whether the couple meet the requirements for clause 309.211(1) and (2) of the Regulations and are in a genuine and continuing spousal relationship.

22. SPOUSE/DE FACTO (cl 309.211(2) & cl 309.221)

Whether the parties are in a spouse or de facto relationship

23. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
24. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's

and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A copy of the couple's marriage certificate is in the Department file provided to the Tribunal at folio 237. It evidences they married [in] October 2017 in [Suburb] and is dated 21 November 2017. Photographs of the couple's wedding are also contained in the Department file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

26. Financial aspects of the relationship

27. The Tribunal was provided evidence that the couple share a bank account. It is used to pay for bills and rent. The joint bank account also demonstrates that the primary applicant currently financially supports the sponsor and their son, including paying for his day care and an educational programme which assists his [Condition].
28. The primary applicant also supports the sponsor and her teenage daughter from a previous marriage. This child is not financially supported by child support from her biological father as he lives overseas.
29. The couple do not have rent receipts. This is because they give the money to the primary applicant's brother as the property is rented in his name and he pays the rent.
30. The Tribunal heard that the sponsor found it impossible to rent as a single woman with a child. Previously, she was living with friends and had no rental history. The primary applicant had not rented previously and had lived with his brother prior to moving in with the sponsor.
31. The primary applicant's brother assisted them by renting a property in his name. He had rental credentials and knew the agent of the house that the couple are now living in.
32. The Tribunal was curious as to why the couple did not secure a rental agreement in their own names. Testimony was provided to the Tribunal that this had not been a priority and that their landlord was comfortable with the current arrangement. They are now saving a deposit for their own home and hope that this will be in both of their names, provided the primary applicant can satisfy the visa requirements. The Tribunal places some small weight in favour of the primary applicant.
33. The primary applicant provided a copy of utility bills in both names. The Tribunal heard that the primary applicant and his brother wished to start a [business]. Thus, the brother contributed \$50,000 whilst the sponsor took out a \$50,000 loan on the primary applicant's behalf. Due to his visa status the primary applicant was unable to obtain a loan himself.
34. The sponsor then re-loaned the original \$50,000 amount when it was almost paid out, injecting further capital into the business. The primary applicant and his brother are business partners.

35. The Tribunal heard that there is a strong degree of trust between the sponsor and the two brothers. The sponsor assumed responsibility for \$100,000 to finance the [business] which she would have been required to pay back had the primary applicant defaulted on the promised loan repayments.
36. The loan has been paid back in full by the primary applicant and his brother. The company now has \$1.1 million in assets, employs four people and is managed by the primary applicant full time.
37. The sponsor was an associate of the primary applicant's brother in [a] department of the company where she met the primary applicant. She has recently graduated with a degree in [Subjects].
38. The Tribunal has considered the evidence. It is the finding of the Tribunal that the sponsor willingly borrowed money to support the business venture of the primary applicant and his brother. This indicates a level of trust on the part of the sponsor in relation to the two brothers. She appears to have taken a financial risk on not one, but two occasions, to support a business partnership between the primary applicant and his brother.
39. The Tribunal is satisfied that this, together with other material supplied, evidences a genuine pooling of financial resources. This is especially so, as the sponsor funded a business in which she was not a shareholder.
40. The Tribunal finds that this demonstrates a financial commitment towards the primary applicant. The couple shared legal responsibility for the loan as she took out a loan which the primary applicant repaid. The Tribunal finds that this demonstrates the sponsor's faith in the primary applicant that he would honour the agreement, paying her back on two occasions to the amount of \$50,000. The primary applicant honoured the agreement in paying back all of the loan money.
41. The Tribunal finds that the trust the sponsor holds towards the primary applicant is justified as the money has been paid back in full, and the business together with its assets are now substantial. The business now provides an income for the primary applicant, his brother and has four employees. It fully supports the sponsor and her family. The Tribunal has considered all of the evidence placing substantial weight in favour of the primary applicant.

42. Nature of the Household

43. The Tribunal heard that the primary applicant works long hours, often leaving home early for work. But when he comes home from work and on weekends, he spends considerable time with their son, who has [Condition]. They spend time together as a family. When they are able, they often go to the park and have a picnic or BBQ. The primary applicant has accepted the sponsor's teenage daughter, often driving her to visit friends or takes her shopping.
44. The primary applicant helps with the cooking and housework when he is home, although the sponsor does most of the cooking for the family. They pay the bills together. They have been able to go for holidays together. Photographic evidence of their trips to places, such as Sydney and the Great Ocean Road, have been supplied to the Tribunal.
45. The Tribunal in considering this evidence places some weight in favour of the primary applicant.

46. Social aspects of the Relationship

47. The Tribunal heard that when they married, the primary applicant had 5 friends in attendance. However, the sponsor's friends did not approve of their relationship as the primary applicant is Moslem. She lost her friendship with those people and they did not come to their wedding.
48. The sponsor told the Tribunal that she did not mind as she now has her family. Testimony was provided by the sponsor that in spite of the concerns of her former friends, there has been no pressure on her to convert to Islam and the children would probably be brought up in the Moslem faith as she did not have any particular religious views.
49. The Tribunal heard that they spent most of their spare time with their son and step-daughter. They often had days out on road trips or at the park with them, the primary applicant's brother and a few friends. They consider themselves busy, working, and studying and looking after their children. Also, the [business] managed by the primary applicant means he often works 6 days per week.
50. The Tribunal has considered the evidence, and recognises the constraints placed on busy families of young children and the limited opportunities that this allows for socialising. Especially in relation to parents of a child with a disability, such as [Condition], where the parental demands are significant. In this case the sponsor attends a special education facility 3-4 days per week as her son's carer. This places additional demands on her time. The Tribunal accepts the evidence provided and places significant weight in favour of the primary applicant in this regard.

51. Nature of the person commitment to each other

52. The couple have lived together since 2017. They have been in a married relationship for six years. They share one child together are expecting another baby at Christmas this year. The primary applicant is raising the sponsor's daughter and supporting her as his own child.
53. They support each other in their studies, work and business. For cultural reasons, the primary applicant did not go into the birthing room for the birth of their son. However, he was outside the birthing room at the time of the birth. As soon as the child was born, the primary applicant was with his wife and child.
54. They have maintained their relationship since 2016, a period of seven years. The Tribunal heard that they had visited the sponsor's family in [Country 2] and took the opportunity to lodge the Partner Visa there hoping it would be successful.
55. The Tribunal finds that the couple have demonstrated a commitment to maintaining their relationship for seven years. They have continued to support each other and care for their special needs child. They rely on each other for support.
56. The sponsor also supported the primary applicant financially in his business venture. She took out loans to establish the business, and the primary applicant has paid these loans back. Further the primary applicant has provided financial and emotional support to his family while the sponsor was taking care of their son and studying. The Tribunal finds that their care for each other and their children is ongoing and shared.
57. The Tribunal has considered the evidence, finding that the couple demonstrate strong emotional support and commitment towards each other. They see the relationship as long term as they have a family together and plan to buy their own home in the future. Although they admit they are struggling to save in the current economic climate. The Tribunal places some strong weight in favour of the primary applicant in this regard.

58. Any other circumstances

59. The Tribunal is not aware of any other circumstances
60. The Tribunal finds that there is a mutual commitment to shared life to the exclusion of others, that the relationship is genuine and continuing, and that they live together, and not separately and apart on a permanent basis.
61. On the basis of the above, the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision.
62. Therefore, the primary applicant meets cl 309.211 and cl 309.221 of the Regulations.
63. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

64. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 Partner (Provisional) visa:
- cl 309.211 (2) of Schedule 2 to the Regulations
 - cl 309.221 (1) of Schedule 2 to the Regulations

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).